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I. INTRODUCTION

The right-to-work movement originated chiefly as a reaction to the rise of labor power,[1] especially the institutionalization of the labor organization and its growth in membership under the auspices of the Wagner Act of 1935.[2] Political controversy has beset the movement since 1944 when the first contemporary right-to-work law was passed in the state of Florida.[3] Although the controversy peaked as a national issue in the decade of the fifties,[4] it has recurred spo-

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1. The labor movement arose from individual efforts to form groups with those having similar interests in order to gain concessions from a powerful employer. The group struggled for recognition through a series of economic setbacks and general hostility by the courts. In the beginning the courts treated the movement as a criminal conspiracy. Nelles, *The First American Labor Case*, 41 YALE L.J. 165 (1931) (discussing the Philadelphia Cordwainer's Case) (Pa. 1806). The criminal conspiracy doctrine fell into disfavor, and the courts moved to tort liability and also the Sherman Antitrust Act, 15 U.S.C. §§ 1 *et seq.* (1970), as a basis for controlling the group activity. Loewe v. Lawlor, 208 U.S. 274 (1908); United States v. Debs, 64 F. 724 (N.D. Ill. 1894), *aff'd on other grounds*, 158 U.S. 564 (1895). The Clayton Antitrust Act, 15 U.S.C. §§ 12 *et seq.* (1970), was proclaimed as the "magna carta" of American trade unionism. This hope was short-lived. The Supreme Court emasculated the provisions favorable to labor.
Duplex Printing Press Co. v. Deering, 254 U.S. 443 (1921). The injunction was now in its primacy as a weapon to be used against labor groups. *See* F. FRANKFURTER & N. GREEN, THE LABOR INJUNCTION (1930). The Norris-LaGuardia Act, 29 U.S.C. §§ 101 *et seq.* (1970), represented the first major victory for labor of any substance. The act with some exceptions took away jurisdiction from the federal courts to issue injunctions in cases involving labor disputes. After a century of striving, the labor movement achieved its goal of recognition and legitimacy by passage of the first comprehensive labor relations act popularly called the Wagner Act of 1935. The act enabled labor to flourish and become a powerful political force with a base of millions of worker-members and with finances provided by these members for furtherance of labor causes. Many believed that the pendulum had swung too far in labor's favor. There was a reaction at both the state and federal levels.

2. 29 U.S.C. §§ 151 *et seq.* (1970). The original enactment has to be considered very favorable to labor. It had several deficiencies in regard to settling internecine labor disputes and did not include unfair labor practices on the part of labor organizations. The act since its original enactment in 1935 has been extensively amended. 61 Stat. 136 (1947), 65 Stat. 601 (1951), 72 Stat. 945 (1958), 73 Stat. 541 (1959).

3. FLA. CONST. art. I, § 6. This constitutional provision was originally adopted in 1944. The controversy surrounding its adoption served as a pattern for subsequent right-to-work campaigns in other states. Most of the time the political battle over the proposed law was little more than a power struggle beween organized labor and management. Labor viewed the right-to-work movement as an attempt to undermine its power base and as a threat to the worker and group solidarity. Management contended it was a matter of free choice or freedom of association.

4. During the 1940's and 1950's the legislatures or people of almost every state in the union were confronted with a right-to-work proposal. ARK. CONST. amend. 34; ARIZ. CONST. art. XXV; GA. ANN. §§ 54-901 to 54-908 (1974); IOWA CODE ANN. 736 A.1 to 736 A.8 (Supp. 1974); N.C. GEN. STAT. §§ 95-78 to 95-83 (1965); S.D. CONST. art. VI, § 2; TENN. CODE ANN. §§ 50-208 to 50-212 (1966); P. SULTAN, RIGHT-TO-WORK LAWS: A STUDY IN CONFLICT 56-57 (1958). These right-to-work laws were passed before the movement

radically in the states that have enacted or adopted right-to-work provisions.[5] When the right-to-work issue has been raised recently, it has tended to be a mischief-maker, thwarting political fortune and stifling law reform.[6] On this latter account, some questions about right-to-work laws should be examined anew. What continuing validity does the right-to-work issue have against the background of a constantly evolving federal labor legislation? More precisely, what rights accrue to a working person by passage of a right-to-work law in addition to those rights already assured by federal legislation? How does a right-to-work law affect the overall scheme of federal labor legislation?

At the outset, a ruminative discussion of right-to-work is complicated three-fold: (1) The laws are difficult to discuss without recognizing the political harangue into which they are so often cast;[7] the political propaganda has confounded a clear understanding of the

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received its impetus from the enactment of Section 14(b) of the National Labor Relations Act. Labor-Management Relations Act, 29 U.S.C. § 164(b) (1970). Right-to-work became one of the most heated issues of the political circuit in the decade of the 1950's. The controversy very likely reached its peak in 1958 when six states, including Ohio and California, held referenda on proposed right-to-work provisions. The proposition lost on every ballot except in agriculturally-oriented Kansas. The emotion of the issue had been expended leaving nineteen states with a version of right-to-work supported in their constitutions or statutes. Although the din died down in most states, the issue has not been allowed repose.

5. The most recent upsurges of the old right-to-work controversy occurred in North Dakota and Texas. In each case right-to-work proponents tried to write a right-to-work provision into the state constitutional charters.

6. In 1972 the right-to-work issue was again presented to the people of North Dakota during an effort to revise the state constitution. The delegates to the constitutional convention voted to incorporate into the proposed new document a provision which read:

> There shall be no discrimination against a qualified natural person's right to practice a trade or profession or a citizen's right to obtain or hold employment because of race, color, sex, creed, or membership or nonmembership in a trade, labor or professional organization.

Daily Journal of the Constitutional Convention, Proposed 1972 Constitution for North Dakota at 525 (Feb. 17, 1972). The proposal was much broader in its coverage than the state's right-to-work statute. *Compare* N.D. CENT. CODE § 34-01-14 (1972). Adoption may well have brought an end to the nation's first integrated bar—the North Dakota Bar Association. *See* Lathrop v. Donohue, 367 U.S. 820, 826 n.3 (1961). Labor unions opposed the section and, as a consequence of its incorporation, the entire constitution. The people of North Dakota rejected the document at the polls. Although union members constitute a minority in the state, they are sufficiently strong and cohesive to change the balance in an election. The labor vote, together with that portion of any population which is always against change, could well have defeated a very necessary constitutional revision. It would be incorrect to maintain that the right-to-work provision was singularly responsible for the failure of constitutional revision in North Dakota, but it must be listed as one of the major factors.

Along parallel lines, a right-to-work provision helped defeat another vitally-needed constitutional revision in the state of Texas. In Texas the proposed constitution did not receive the approval of the constitutional convention so it was never submitted to the voters. One of the major issues at the convention was the inclusion of a right-to-work clause which the pro-labor delegates opposed. Overall approval of the constitutional document lost by three votes.

7. Right-to-work campaigns have usually been very heated. The propaganda has caused many distortions, so that it has been almost impossible to view the issues in their proper perspective.

See J. DEMPSEY, THE OPERATION OF THE RIGHT-TO-WORK LAWS 15 (1961). The author lists six points which form the pattern in carrying out a successful right-to-work campaign: (1) a persistent and organized effort to get the law passed; (2) the main argument advanced is some variation of freedom of choice; (3) burden of lobbying and support comes from business interests; (4) states have considerable agriculture; (5) proponents disclaim any anti-bias against unions or collective bargaining; and lastly, (6) some local event

issues. The term right-to-work itself is a misnomer and a good example of artful propaganda. These laws do not and were never intended to guarantee a right to work or a right to a job.[8] (2) Due partly to the political forum, other misconceptions are brought about by the indeterminate meaning of some terms used in discussing right-to-work and the unusual definition of others. For example, there is no general agreement on the proper characterization of the various union security devices such as the closed shop, union shop, agency shop or open shop.[9] Membership in a labor organization may not mean membership as such but only a requirement that dues be paid to the organization.[10] Dues may be nothing more than a service fee for actual services rendered.[11] (3) Right-to-work laws though enacted by the states are really an extension of the federal labor regulation and must always be considered in the context of the federal labor laws. Power to pass right-to-work legislation is not based on those powers reserved to the states by the tenth amendment to the United States Constitution, but rather on Section 14(b) of the National Labor Relations Act.[12] Thus, the application of right-to-work laws is limited to the scope of the National Labor Relations Act and those areas remaining under intrastate regulation.[13] A repeal of Section 14(b) would render all right-to-work laws, whether statutes or constitutional provisions, ineffective.[14]

II. THE LAWS

Nineteen states have statutes or constitutional provisions supporting the right-to-work concept.[15] The laws are diverse in form but

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is needed to stir up anti-union feeling and precipitate the passage of the right-to-work law. *See also* P. SULTAN, RIGHT-TO-WORK LAWS: A STUDY IN CONFLICT 63 (1958) (arguments pro and con on the right-to-work laws).

8. A careful reading of any one of the right-to-work statutes or constitutional provisions will verify the misnomer. The focal point of these statutes is membership or nonmembership in a labor union as a condition of employment. N.D. CENT. CODE § 34-01-14 (1972) states: "The right of persons to work shall not be denied or abridged on account of membership or nonmembership in any labor union or labor organization. . . ." ARIZ. CONST. art. XXV, states: "No person shall be denied the opportunity to obtain or retain employment because of non-membership in a labor organization. . . ."

9. Some courts have defined these terms in their opinion but for the most part there is no general agreement as to their precise meaning or proper usage. There is a tendency by some to use the terms closed shop and union shop interchangeably. There is some question whether there is any remaining difference between the union shop and agency shop. For the purposes of this article the terms will be defined in the footnotes when they are used for the first time.

10. NLRB v. General Motors Corp., 373 U.S. 734, 742 (1963); Radio Officers' Union v. NLRB, 347 U.S. 17, 41 (1954).

11. [1964-66] OP. N.D. ATTY. GEN. 142. Fees charged to nonmembers should be based on actual cost.

12. 29 U.S.C. § 164(b) (1970); Retail Clerks Local 1625 v. Schermerhorn, 375 U.S. 96 (1963); Retail Clerks Local 1625 v. Schermerhorn, 373 U.S. 746 (1963); Hudson v. Atlantic Coast R.R., 242 N.C. 650, 89 S.E.2d 441 (1955).

13. *Id.*

14. *Id.*

15. ALA. CODE tit. 26, § 375 (1958) (enacted in 1953); ARIZ. CONST. art. XXV (enacted in 1946); ARK. CONST. amend. 34 (enacted in 1944); FLA. CONST. art. I, § 6 (enacted in 1944); GA. CODE ANN. §§ 54-901 to 54-908 (1974) (enacted in 1947); IOWA CODE ANN. §§ 736A.1 to 736A.8 (Supp. 1974) (enacted in 1947); KAN. CONST. art. 15, § 12 (1969) (enact-

at the core of most of them is wording like that embodied in the North Dakota law:

> The right of persons to work shall not be denied or abridged on account of membership or nonmembership in any labor union or labor organization. . . .[16]

The Arizona law is similar, however, it contains a different emphasis. The 1946 constitutional amendment reads:

> No person shall be denied the opportunity to obtain or retain employment because of non-membership in a labor organization. . . .[17]

This law obviously does not protect the labor union member who is denied employment because of his memberhsip in a labor organization.[18] Most state statutes evince a more neutral position by protecting members as well as non-members.[19]

The majority of states extend the principle of the North Dakota statute by specifically prohibiting any requirement that a person pay dues, fees, or other charges to a labor union as a condition of employment.[20] Contracts which include agreements in violation of the right-to-work law are declared void.[21] A few states make violation of the right-to-work provisions a crime.[22]

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ed in 1958); MISS. CONST. art. 7, § 198-A (enacted in 1960); NEB. CONST. art. 15, §§ 13-15 (enacted in 1946); NEV. REV. STAT. §§ 613.230 to 613.300 (1973) (enacted in 1953); N.C. GEN. STAT. §§ 95-78 to 95-83 (1965) (enacted in 1947); N.D. CENT. CODE § 34-01-14 (1972) (enacted in 1947); S.C. CODE ANN. §§ 40-46 to 40-46.8 (1962) (enacted in 1954); S.D. CONST. art. VI, § 2 (enacted in 1946); TENN. CODE ANN. §§ 50-208 to 50-212 (1966) (enacted in 1947); TEX. REV. CIV. STAT. arts. 5154g, 5207a (1971) (enacted in 1947); UTAH CODE ANN. §§ 34-34-1 to 34-34-16 (1971) (enacted in 1955); VA. CODE ANN. §§ 40.1-58 to 40.1-69 (Cum. Supp. 1974) (enacted in 1947); WYO. STAT. ANN. §§ 27-245.1 to 27-245.8 (1967) (enacted in 1963). ARK. STAT. ANN. §§ 81-210 to 217 (1960); ARIZ. REV. STAT. 23-1301 to 1307 (1971); MISS. CODE ANN. 71-1-47 (1973); and NEB. REV. STAT. §§ 48-217 to 219 (1968) have right-to-work statutes in addition to the constitutional provisions cited. Louisiana has a right-to-work provision which applies only to agricultural workers, LA. REV. STAT. ANN. §§ 23-881 to 889 (1964).

16. N.D. CENT. CODE § 34-01-14 (1972).

17. ARIZ. CONST. art. XXV.

18. This is not a denial of equal protection as long as Arizona has other statutes protecting union members against discrimination ("yellow dog contracts"). AFL v. American Sash & Door Co., 335 U.S. 538 (1949).

19. All the state right-to-work laws except ARIZ. CONST. art. XXV and NEV. REV. STAT. §§ 613.230 to 613.300 (1973) protect members and nonmembers.

20. ALA. CODE tit. 26 § 375(5) (1958); ARK. STAT. ANN. § 81-202 (1960); GA. CODE ANN. § 54-903 (1974); IOWA CODE ANN. § 736A.5 (Supp. 1974); MISS. CODE ANN. § 71-1-47 (d) (1973); NEB. REV. STAT. § 48-217 (1968); N.C. GEN. STAT. § 95-82 (1965); S.C. CODE ANN. § 40-46.2(3) (1962); TENN. CODE ANN. § 50-210 (1966); UTAH CODE ANN. § 34-34-10 (1974); VA. CODE ANN. § 40.1-62 (1970); and WYO. STAT. ANN. § 27-245.4 (1967) prohibit payment of dues or fees or charges to labor organizations as a condition of employment.

21. Only GA. CODE ANN. § 54-904 (1974); MISS. CONST. art. 7 § 198-14; NEV. REV. STAT. § 613.260 (1973); and TEX. REV. CIV. STAT. art. 5207a, § 3 (1971) declare void any contract provision contrary to the right-to-work law. ALA. CODE tit. 26 § 375(2) (1958); ARIZ. REV. STAT. § 23-1302 (1971); ARK. STAT. ANN. § 81-203 (1960); IOWA CODE ANN. § 736A.3 (1974); NEB. REV. STAT. § 48-217 (1968); N.C. GEN. STAT. § 95-79 (1965); S.D. COMPILED LAWS ANN. § 60-85 (1969); TENN. CODE ANN. § 50-209 (1966); UTAH CODE ANN. § 34-34-5 (1974); and VA. CODE ANN. § 40.1-65 (1970) declare such a contract provision illegal.

22. ARK. STAT. ANN. § 81-204 (1960); IOWA CODE ANN. § 736A.6 (Supp. 1974); NEB. REV. STAT. § 48-219 (1968); S.D. COMPILED LAWS ANN. § 60-8-7 (1969); TENN. CODE ANN. § 50-212 (1966); UTAH CODE ANN. § 34-34-17 (1974); VA. CODE ANN. § 40.1-69 (Cum. Supp. 1974); and WYO. STAT. ANN. § 274-245.8 (1967) attach a criminal penalty to violation of the statute.

Membership or non-membership in a labor union as a condition of employment is at the heart of the legal conflict of interest underlying the right-to-work controversy. The conflict is between labor's right to organize, solidify its strength and preserve the group interest, and the individual worker's right to obtain and keep his job (depending only on the job's continuing availability and the worker's willingness and ability to do the work) unfettered by organizational entanglements he may not want. Essentially the cleavage comes when the group and the individual attempt to exercise fully their respective rights. What raises the ire of right-to-work advocates is the federal solution of imposing membership by majority rule (and employer agreement), rather than by individual consent; this is the odious compulsory union membership.[23] As a matter of fundamental importance, right-to-work proponents would present the question as one of freedom to associate or not associate, or freedom of choice. They would resolve the issue in favor of absolute individual determination, a right-to-work law.

The primary focus of these laws is, therefore, membership or non-membership in a labor union as a condition of employment. The motivating force behind passage of the laws is the belief that a working person in a free society should not be required to join a labor organization in order to obtain or retain his job. As codified, this tenant would eliminate compulsory union membership insofar as it may be made obligatory under Section 8(a) (3) of the National Labor Relations Act.[24]

Right-to-work laws have withstood the challenge that they are constitutionally infirm.[25] These laws have also survived the various attacks as to their general import and specific applicability.[26] The two most important questions of continuing relevance, particularly to the issues raised herein, are those dealing with the coverage or application of the right-to-work laws and the forms of union security if any are permitted thereunder.

The extent to which the right-to-work states may carry out their policy of individual determination is dependent upon federal statutes and interpretation of those statutes by the federal courts. Section 14 (b) of the National Labor Relations Act allows the states to prohibit any agreement requiring membership in a labor organization as a con-

23. Compulsory union membership is the phrase used in the arguments but the federal law requires only the tender of periodic dues and initiation fees, not membership as that term is commonly used. NLRB v. General Motors Corp., 373 U.S. 734, 742 (1963).

24. 29 U.S.C. § 158(a)(3) (1970). The section is set out verbatim at note 92 *infra*.

25. AFL v. American Sash & Door Co., 335 U.S. 538 (1949); Lincoln Fed. Labor Union v. Northwestern Iron & Metal Co., 335 U.S. 525 (1949).

26. Finney v. Hawkins, 189 Va. 878, 54 S.E.2d 872 (1949). *See generally* annot., 92 A.L.R.2d 598 (1963).

dition of employment.[27] This section is a statutory exception to the general proposition that all actions arguably subject to Section 7 and Section 8 of the Act are within the exclusive jursidiction of the National Labor Relations Board, a federal agency.[28] Right-to-work laws are therefore circumscribed by the operative breadth of Section 14 (b) and the National Labor Relations Act to which it is an exception.[29]

In construing 14 (b) in two agency shop[30] cases, the Supreme Court felt constrained to transform the key word "membership" into a term, "whittled down to its financial core,"[31] in order to make it parallel to the Court's reading of Section 8 (a) (3) in another part of the NLRA. Although exceptions have generally been given a narrow construction, in this case the interpretation gave to the exception greater breadth and to the states leeway to prohibit not only the union shop,[32] which in its classic form requires membership in a labor organization, but also less onerous union security arrangements such as agency shop agreements,[33] which generally do not require membership in a labor organization as the word membership is usually used.[34]

States are given the authority by Section 14 (b) to enact right-to-work laws, interpret them and enforce them.[35] This power is limited, however, and "begins *only with actual negotiation and execution of the type of agreement described by Section* 14 (b)."[36] State courts, for example, may not enjoin picketing for a union shop which is pro-

27. 29 U.S.C. § 164(b) (1970): "Nothing in this subchapter shall be construed as authorizing the execution or application of agreements requiring membership in a labor organization as a condition of employment in any State or Territory in which such execution or application is prohibited by State or Territoral law.

28. Retail Clerks Local 1625 v. Schermerhorn, 375 U.S. 96 (1963).

29. *Id.;* Retail Clerks Local 1625 v. Schermerhorn, 373 U.S. 746 (1963); Hudson v. Atlantic Coast Line R.R., 242 N.C. 650, 89 S.E.2d 441 (1955).

30. The agency shop is a form of union security wherein the employer and the exclusive bargaining agent agree that an employee does not need to become a member of the labor organization representing all the employees, but the employee is required to pay a service fee to the exclusive bargaining representative which is usually the equivalent of regular union dues and initiation fees. The service fee may be limited to the employee's pro rata share of the actual cost of collective bargaining and administration of the agreement.

31. NLRB v. General Motors Corp., 373 U.S. 734, 742 (1963); Retail Clerks Local 1625 v. Schermerhorn, 373 U.S. 746 (1963).

32. The union shop form of union security requires membership in the labor organization serving as the exclusive bargaining representative for all the employees in an appropriate bargaining unit. The employee need not join the labor organization until a designated time after the date of employment, at least thirty days. This form of union security is permitted under the National Labor Relations Act if an employer and the exclusive bargaining agent agree to write such a provision into the collective bargaining agreement. The union shop under the NLRA differs from the common understanding of the terms of the union shop in that "membership" according to the NLRA requires only the tender of periodic dues and initiation fees; actual joining of the organization is not compelled.

33. NLRB v. General Motors Corp., 373 U.S. 734, 742 (1963); Retail Clerks Local 1625 v. Schermerhorn, 373 U.S. 746 (1963).

34. Refer to note 30 *supra.*

35. Retail Clerks Local 1625 v. Schermerhorn, 375 U.S. 96 (1963); Retail Clerks Local 1625 v. Schermerhorn, 373 U.S. 746 (1963).

36. Retail Clerks Local 1625 v. Schermerhorn, 375 U.S. 96, 105 (1963) (emphasis theirs).

hibited by state law.[37] Since there has been no actual negotiation and execution of the type of agreement prohibited, the picketing action is within the exclusive jurisdiction of the NLRB even if its purpose could bring about an illegal result according to state law.

Another type of restriction upon the general applicability of the right-to-work laws can be found in the Railway Labor Act.[38] The union activities of railroad and airline employees are regulated by the RLA which authorizes complusory union membership without statutory exception.[39] This means that a state right-to-work law does not apply to railroad and airline employees and therefore does not have a universal application to all the workers in the state.[40] The law is limited in its force and effect to only those workers covered by the National Labor Relations Act or those workers remaining under state authority (no preemption). After the *General Motors*[41] and *Schermerhorn*[42] decisions it was clear that any question about the type of union security agreement allowed under a state right-to-work law was a matter for the state legal authorities in interpreting their own right-to-work laws. All of the state courts and opinions of state attorneys general have been unanimous in declaring all forms of union security illegal under their respective right-to-work statutes.[43] Only Indiana[44] and North Dakota[45] for a time allowed the agency shop. Indiana repealed its right-to-work law[46] and just recently the North Dakota Supreme Court, when presented the question, set

37. *Id.*

38. 45 U.S.C. §§ 151-188 (1970).

39. *Id.* § 152, Eleventh. This section reads:

> Notwithstanding any other provisions of this chapter, or of any other statute or law of the United States, or Territory thereof, or of any State, any carrier or carriers as defined in this chapter and a labor organization or labor organizations duly designated and authorized to represent employees in accordance with the requirements of this chapter shall be permitted—(a) to make agreements, requiring, as a condition of continued employment, that within sixty days following the beginning of such employment, or the effective date of such agreements, whichever is the later, all employees shall become members of the labor organization representing their craft or class: *Provided*, That no such agreement shall require such condition of employment with respect to employees to whom membership is not available upon the same terms and conditions as are generally applicable to any other member or with respect to employees to whom membership was denied or terminated for any reason other than the failure of the employee to tender periodic dues, initiation fees, and assessments (not including fines and penalties) uniformly required as a condition of acquiring or retaining membership.

Id.

40. Hudson v. Atlantic Coast Line R.R., 242 N.C. 650, 89 S.E.2d 441 (1955); International Ass'n of Machinists v. Sandberry, 277 S.W.2d 776 (Tex. 1954), *aff'd*, 156 Tex. 340, 295 S.W.2d 412 (1956), *cert. denied*, 353 U.S. 918 (1957).

41. NLRB v. General Motors Corp., 373 U.S. 734 (1963).

42. Retail Clerks Local 1625 v. Schermerhorn, 373 U.S. 746 (1963).

43. Schermerhorn v. Local 1625 Retail Clerks, 141 So. 2d 269 (Fla. 1962); Higgins v Cardinal Mfg. Co., 188 Kan. 11, 360 P.2d 456 (1961); Guard Assoc. v. Wackenhut Services, Inc., 86 LRRM 2818 (Nev. 1974); Ficek v. International Bhd. of Boilermakers, 219 N.W.2d 860 (N.D. 1974); OP. ARIZ. ATTY. GEN. 62-2, Nov. 24, 1961; OP. N.C. ATTY. GEN., June 7, 1960; OP. TEX. ATTY. GEN. WW-1018, 1961.

44. Meade Electric Co. v. Hagberg, 129 Ind. App. 631, 159 N.E.2d 408 (1959).

45. [1952] OP. N.D. ATTY. GEN.; [1959] OP. N.D. ATTY. GEN. 155; [1966] OP. N.D. ATTY. GEN. 42.

46. Indiana had a right-to-work law from 1957-1965

aside a series of attorney general opinions of twenty-two years standing and declared the agency shop repugnant to the North Dakota right-to-work law.[47] In *Ficek v. International Brotherhood of Boilermakers*[48] the court held that the North Dakota law adopted in 1947 prohibited the agency shop form of union security, thus the last bastion of the agency shop came down.[49]

The North Dakota court based its decision on the rationale of other courts in jurisdictions having similar right-to-work provisions and on what it perceived as legislative intent in enacting the law.[50] Considering the *General Motors*[51] decision the holding would appear, at least at first glance, to be a logically sound conclusion. A more profound analysis, however, could have brought about a different result, especially if the intent of the North Dakota legislature were to control the interpretation of the North Dakota statute. Although the *General Motors*[52] case may have raised some doubt as to the meaning of membership, the case is not authoritative on how membership should be construed in the North Dakota statute nor are the authorities cited by the court any more helpful in determining legislative intent in this regard.[53] The key to discerning legislative intent lies in understanding the problem which the legislature was attempting to solve and comparatively evaluating its options. The North Dakota court acknowledges the problem as one of balancing freedom of choice or association against the free rider argument.[54]

The North Dakota legislature should have been well-informed in coming to its decision, thus it must have had at its disposal the Arizona approach[55] as well as the approach of the several states that had previously adopted statues specifically prohibiting the payment of fees, dues or charges to a labor organization as a condition of employment.[56] It rejected these approaches and opted for a very simple statute that assures a worker he will not be required to join a labor organization but says nothing about his obligation to pay his fair

47. Ficek v. International Bhd of Boilermakers, 219 N.W.2d 860 (N.D. 1974).
48. *Id.*
49. *Id.* at 865-66.
50. *Id.* at 871.
51. NLRB v. General Motors Corp., 373 U.S. 734 (1963).
52. *Id.*
53. Public policy does not really help determine what the legislature intended in its use of the word "membership." The authority of "public policy in labor relations" is also not very persuasive in regard to interpretation of the statute in general. "Declining to associate with his fellows" does not go to the crux of the argument: does the statute prohibit an agreement which requires a worker to pay his fair share of the collective bargaining expenses once a bargaining unit has been organized by a vote of the majority.
54. Ficek v. International Bhd. of Boilermakers, 219 N.W.2d 860, 866-71, 871 (N.D. 1974).
55. ARIZ. CONST. art. XXV.
56. ARK. STAT. ANN. § 8-202 (1960) (enacted in 1947); GA. CODE ANN. § 54-903 (1974) (enacted in 1947); IOWA CODE ANN. § 736A.5 (Supp. 1974); (enacted in 1947); N.C. GEN. STAT. § 95-82 (1965) (enacted in 1947); TENN. CODE ANN. § 50-210 (1966) (enacted in 1947); and VA. CODE ANN. § 40.1-62 (1970) (enacted in 1950). These states with right-to-work provisions specifically prohibiting payment of any fees to a labor organization as a condition of employment enacted their right to work laws before or at the time.

share of the costs of collective bargaining.[57] Some distinctive significance must be accorded the North Dakota legislature's approach and nothing else is apparent except that the legislature did in fact intend that a worker should pay his fair share of the costs of collective bargaining if a majority of his fellow workers voted to organize and the non-member worker received benefits as a result of the collective bargaining effort.

As an analysis of the federal labor legislation and the cases interpreting it will demonstrate, a holding that an agency shop is a permitted form of union security under a right-to-work law would not render that law obsolete and useless. There are still very important and viable distinctions between the union shop allowed under the federal law and the agency shop allowed under a state right-to-work statute.[58] The North Dakota attorney general made the distinctions even more significant in his interpretation of the agency shop—limiting payment by nonunion members to service fees "sufficient to cover the costs incurred by the bargaining agent which were necessary to properly represent all the employees."[59] Such fees would not be the equivalent of dues and initiation fees required by the federal statue.

In its inception the right-to-work movement had several convincing arguments based on individual rights and inadequacies in the federal labor law to support its cause. There were many cases under the Wagner Act where employees were expelled from their union and as a result lost their jobs. Because of its facts the *Colgate-Palmolive-Peet*[60] case is illustrative of the problem. Certain employees attempted to organize and promote a rival union as the exclusive bargaining agent for their collective bargaining unit. The movement failed and the union expelled these employees from membership. Since the collective bargaining agreement provided for a closed shop,[61] upon demand by the union the employer discharged the expelled workers. It was argued that these employees were only exercising their rights under Section 7 of the NLRA, that is, the right of employees to freely choose their bargaining representative, but the Supreme Court sanctioned the closed union,[62] closed shop and the

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that North Dakota adopted its statute, N.D. CENT. CODE § 34-01-14 (1972) (enacted in 1947). The legislature must have been aware of this particular right-to-work format.

57. N.D. CENT. CODE § 34-01-14 (1972).

58. Refer to text accompanying notes 108-113, *infra*.

59. OP., *supra* note 11, at 142.

60. Colgate-Palmolive-Peet Co. v. NLRB, 338 U.S. 355 (1949).

61. A closed shop is a security agreement between employer and labor organization which requires membership in the labor union as a condition precedent to hiring. Membership must be maintained while employed or for the duration of the agreement.

Some would consider the union security agreement in this case a variation of the union shop since there was a provision for employment of nonmember workers under some conditions. These nonmembers had to become members within a fixed period of time.

62. A closed union will not admit new members except on a very selective basis. Most of the decisions to exclude would be based on race, color, creed, sex, national origin, family

discharge on the basis of the law at that time. An applicable right-to-work law would have prohibited the closed shop agreement and these employees would not have lost their jobs.

During the years of the Wagner Act the closed union and the closed shop were permitted to exist side-by-side. Workers, otherwise qualified, could be kept out of certain skilled trades and thereby denied employment by a closely controlled local union, which for the most arbitrary reasons or no reason at all, could refuse to admit the worker to membership.[63] State courts attempted to alleviate the affects of any labor monopolies created, but only right-to-work laws could prevent control of area labor market in certain skills.[64]

The federal law, however, did not remain static. While the right-to-work campaign thrived and then languished at the state level, important changes were being implemented in the national labor policy. In 1947 the Taft-Hartley Act became law.[65] It amended the National Labor Relations Act to include unfair labor practices on the part of labor organizations.[66] Other amendments prohibited the closed shop and made it more difficult to maintain a closed union.[67] Twelve years later charges against unions of financial scandal, corruption and communist infiltration pressured Congress to pass the Landrum-Griffin Act[68] regulating internal union affairs and including a bill of rights for union members. The curtailing of union power continued into the 1960's when the union group interest had to bend to the civil rights movement. Activist courts concerned about individual rights began discussing first amendment freedoms in the

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relationships or to control the supply of labor or the labor market in a given area. Cases cited notes 63 and 64 *infra*. The union considers itself a voluntary private organization and therefore can control its membership by refusing to admit members for the most arbitrary of reasons or no reason at all. Oliphant v. Brotherhood of Locomtive Firemen & Enginemen, 262 F.2d 359 (6th Cir. 1958), *rehearing denied*, 359 U.S. 935, *petition for rehearing denied*, 359 U.S. 962 (1959). *But see* Civil Rights Act of 1964 § 703(c), 42 U.S.C. § 2000e-2c (Supp. I, 1972) set out verbatim at note 70 *infra*.

63. *See, e.g.*, Kotch v. Board of Port Pilot Comm'rs, 330 U.S. 552 (1947); Steele v. Louisville & Nashville R.R., 323 U.S. 192 (1944); Oliphant v. Brotherhood of Locomotive Firemen & Enginemen, 262 F.2d 359 (6th Cir. 1958), *rehearing denied*, 359 U.S. 935, *petition for rehearing denied*, 359 U.S. 962 (1959); State Comm'n for Human Rights v. Farrell, 43 Misc. 2d 958, 252 N.Y.S.2d 649 (1964). *See also* Colgate-Palmolive-Peet Co. v. NLRB, 338 U.S. 355 (1949).

64. Closed union and closed shop constitute an unlawful interference with a worker's right to employment. Wilson v. International Bhd. of Boilermakers, 27 Cal. 2d 586, 165 P.2d 903, 905 (1946). Monopoly or near monopoly of the labor market deprives workers of the right to earn a livelihood. Wilson v. Newspaper & Mail Deliverers' Union, 123 N.J. Eq. 347, 197 A. 720 (1938). *See also* Walter v. McCarvel, 309 Mass. 260, 34 N.E.2d 677 (1941); Lucke v. Clothing Cutters' & Trimmers' Assembly No. 3507, 77 Md. 396, 26 A. 505 (1893).

65. Labor-Management Relations Act, 61 Stat. 136 (1947). The Act, popularly called the Taft-Hartley Act, after its primary sponsors, substantially amended the National Labor Relations Act, 29 U.S.C. §§ 151 *et seq.* (1970), but also included new provisions of its own, 29 U.S.C. §§ 171 *et seq.* (1970).

66. National Labor Relations Act § 8(b), 29 U.S.C. § 158(b) (1970).

67. National Labor Relations Act § 8(a)(3), 29 U.S.C. § 158(a)(3) (1970).

68. Labor-Management Reporting and Disclosure Act (1959), 29 U.S.C. §§ 401-531 (1970). This legislation also amended the National Labor Relations Act, 29 U.S.C. §§ 151 *et seq.* (1970).

context of trade unionism.[69] The Civil Rights Act of 1964 forbade discrimination by labor unions on the basis of race, color, religion, sex, or national origin.[70] Even though the success of labor has clearly been dependent on the cohesion of the group, it can no longer be taken for granted (if it ever were) that the interests of the group are concomitant with the best interests of the individual. It is in light of this progress made at the federal level in protecting the individual and his rights that the question about the continuing validity of the right-to-work argument at the state level may be raised.

III. THE ISSUES

A. THE GOAL OF NATIONAL LABOR POLICY

The goal of national labor legislation is to promote industrial peace and stability through collective bargaining.[71] To achieve this goal the federal government has devised an intricate scheme, within constitutional limitations,[72] to regulate the relations between the individual or group and the employer whenever the relationship affects interstate commerce.[73] The National Labor Relations Act[74] represents a gradual development[75] of this labor policy, and its legal

69. Brotherhood of Ry. & Steamship Clerks v. Allen, 373 U.S. 113 (1963); International Ass'n of Machinists v. Street, 367 U.S. 740 (1961); Linscott v. Miller Falls Co., 440 F.2d 14 (1st Cir.), *cert. denied*, 404 U.S. 872 (1971).

70. 42 U.S.C. § 2000e (1970), *as amended*, 42 U.S.C. § 2000e-2c (Supp. II, 1972).

> It shall be an unlawful employment practice for a labor organization—
> (1) to exclude or to expel from its membership, or otherwise to discriminate against, any individual because of his race, color, religion, sex, or national origin;
> (2) to limit, segregate, or classify its membership or applicants for membership, or to classify or fail or refuse to refer for employment any individual, in any way which would deprive or tend to deprive any individual of employment opportunities, or would limit such employment opportunities or otherwise adversely affect his status as an employee or as an applicant for employment, because of such individual's race, color, religion, sex, or national origin; or
> (3) to cause or attempt to cause an employer to discriminate against an individual in violation of this section.

Id.

71. National Labor Relations Act § 1, 29 U.S.C. § 151 (1970). The court in Brooks v NLRB, 348 U.S. 96, 103 (1954) states:

> The underlying purpose of this statute is industrial peace. . . . Congress has devised a formal mode for selection and rejection of bargaining agents and has fixed the spacing of elections, with a view of furthering industrial stability and with due regard to administrative prudence.

See also United Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574 (1960); Textile Workers Union v. Lincoln Mills, 353 U.S. 448 (1957); J.I. Case Co. v. NLRB, 321 U.S. 332 (1944); NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937).

72. NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937).

73. National Labor Relations Act §§ 2(6), 2(7), 29 U.S.C. § 152 (6) (7) (1970). The Court in NLRB v. Reliance Fuel Oil Corp., 371 U.S. 224, 226 (1963) stated that in the National Labor Relations Act "affecting commerce" means the "fullest jurisdictional breadth constitutionally permissible." Particular instances are not the key, but rather the overall impact that many such instances may have in disrupting commerce. *See also* Polish National Alliance v. NLRB, 322 U.S. 643 (1944); NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937).

74. 29 U.S.C. §§ 151 *et. seq.* (1970) [hereinafter referred to as NLRA or the Act].

75. Refer to note 2, *supra*, discussing the amendments and therefore the change in national labor policy since the original enactment of the NLRA. Enactment of many other statutes collateral to the national labor policy has also effected substantial change, for

requirements are policy decisions on the best way to achieve the goal of industrial peace.[76]

The NLRA gives the National Labor Relations Board (NLRB),[77] a federal agency, exclusive jurisdiction to resolve all labor disputes arising within the broad, liberally-interpreted[78] purview of the Act.[79] State law is preempted as to any labor disputes which are arguably within Section 7 and Section 8 over which the Board asserts jurisdiction.[80] There are, of course, exceptions to the rule.[81]

B. RIGHTS OF EMPLOYEES AND THE SELECTION OF AN EXCLUSIVE BARGAINING REPRESENTATIVE

The rights of employees are set out in Section 7.[82] They shall have the right to organize, bargain collectively and engage in concerted activity. They also have the right to refrain from all such activity except as qualified by Section 8(a)(3).[83] At the heart of national labor policy is the concept of majority rule.[84] A majority of workers in an appropriate bargaining unit may by their vote make a contract with the union for all the members of the unit—even the dissenters. Section

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example, the Civil Rights Act of 1964, 42 U.S.C. § 2000e (1970), *as amended*. 42 U.S.C. § 2000e-2c (Supp. II, 1972).

76. *See* 29 U.S.C. § 151 (1970) and cases cited *supra*, note 71.

77. 29 U.S.C. §§ 153-56 (1970) [The National Labor Relations Board shall hereinafter be referred to as the NLRB or the Board]. Powers of the Board are set out in sections 9(b), (c) and 10(a) of the act. 29 U.S.C. §§ 159(b), (c) & 160(a) (1970).

78. This has been the tendency of the courts since the new labor legislation was enacted, as opposed to the holding in Duplex Co. v. Deering, 254 U.S. 443 (1921), vitiating the intent behind the Clayton Act. NLRB v. Hearst Publications, 322 U.S. 111 (1944); U.S. v. Hutcheson, 312 U.S. 219 (1941).

79. NLRA § 14(c)(1), 29 U.S.C. § 164(c)(1):

> The Board, in its discretion, may, by rule of decision or by published rules adopted pursuant to the Administrative Procedure Act, decline to assert jurisdiction over any labor dispute involving any class or category of employers, where, in the opinion of the Board, the effect of such labor dispute on commerce is not sufficiently substantial to warrant the exercise of its jurisdiction: *Provided*, That the Board shall not decline to assert jurisdiction over any labor dispute over which it would assert jurisdiction under the standards prevailing upon August 1, 1959.

80. The leading case setting out the doctrine of preemption in respect to labor relations and the exclusivity of NLRB jurisdiction is San Diego Building Trades Council v. Garmon, 359 U.S. 236 (1959). *See also* Motor Coach Employees v. Lockridge, 403 U.S. 274 (1971).

81. Most of the exceptions are noted in Vaca v. Sipes, 386 U.S. 171 (1967). *See also* Linn v. Plant Guard Workers, 383 U.S. 53 (1966); Hanna Mining Co. v. Marine Engineers Benefit Assoc., 382 U.S. 181 (1965).

82. NLRA § 7, 29 U.S.C. § 157 (1970), provides:

> Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in NLRA § 8(a)(3), 29 U.S.C. § 158(a)(3) (1970).

83. *Id.*

84. "The majority-rule concept is today unquestionably at the center of our federal labor policy." NLRB v. Allis Chalmers Mfg Co., 388 U.S. 175, 180 (1967) *quoting* Wellington, *Union Democracy and Fair Representation: Federal Responsibility in a Federal System*, 67 YALE L.J. 1327, 1333 (1958).

9[85] sets up the framework within which employees may carry out their right to organize. If a majority of employees in an appropriate bargaining unit, that is, employees with a mutuality of interest,[86] vote to orgainze, they may designate an exclusive bargaining representative for the purpose of carrying out collective bargaining. This bargaining representative may be a union, internationally-affiliated, or any association or group formed by the employees as long as it is not employer-dominated.[87] The objective of Sections 7 and 9 is not only to give employees the right to organize but also the means to do so.

Practical application of these rights means that workers may consider it to their advantage to approach the employer as a group to ask for increased benefits.[88] A group effort can add strength to their side at the bargaining table. If a majority of employees at the place of work do not see this advantage, there is no organization and hence no exclusive bargaining representative. Once the majority has voted to organize, however, and selected a bargaining representative, a duty is imposed on the bargaining agent to represent all of the employees in the unit fairly[89]—whether they are members of the organ-

85. NLRA § 9(a), 29 U.S.C. § 159(a) (1970), provides:
Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment. . . .

86. The Board makes the determination on the appropriate bargaining unit. NLRA § 9(b), 29 U.S.C. § 159(b) (1970). Mutuality of interest is the primary factor in coming to a determination. Whether a plantwide unit or a craft unit is appropriate depends on additional factors.

87. NLRA § 2(5), 29 U.S.C. § 152(5) (1970). It is an unfair labor practice for an employer to dominate or interfere with any labor organization. NLRA § 8(a)(2), 29 U.S.C. § 158(a)(2) (1970).

88. The labor movement in America is dependent upon the group interest for its strength and success. The legal process reflected in the development of this group interest is among the most complex and fascinating in Anglo-American jurisprudence. Of special significance is the difficulty encountered in promoting the "group"—now recognized as a cornerstone of the power structure of twentieth century American society and government. *See* Vegelahn v. Guntner, 167 Mass. 92, 44 N.E. 1077, 1079 (1896) (J. Holmes dissenting); Plant v. Woods, 176 Mass. 492, 57 N.E. 1011, 1015 (1900) (J. Holmes dissenting). The low point in trying to achieve solidarity of the group in the labor movement came in Hitchman Coal & Coke Co. v. Mitchell, 245 U.S. 229 (1917). *See* Blumrosen, *Group Interest in Labor Law*, 13 RUTGERS L. REV. 432 (1959).

The labor group matured and garnered strength from the various labor acts supporting it. The labor organization was no longer to be a floundering, disorganized association striving for status, but rather an established institution in our society—a primary group. Industrialization and the encroachment of the mass media solidified pressures toward fad, uniformity and ideological conformity. The response has been a gradual shift from the interest of the group to interest in the individual and his rights and privileges. This flux affected the labor organization as much as any other group. The movement has now come full circle. Whereas, in the beginning, individual workers attempted to group together to gain concessions from their employer, now that the group has gained status and taken on the cloak of establishment, its role has become one of protecting itself. Dissenters try to break away from the uniformity and conformity imposed in striving for any group goal.

89. NLRA § 9, 29 U.S.C. § 159 (1970), impresses on the exclusive bargaining agent the duty of representing *all* the employees of the unit. The duty of fair representation is a judicially created obligation originating in Steele v. Louisville & Nashville R.R., 323 U.S. 192 (1944); Vaca v. Sipes, 386 U.S. 171 (1967); Ford Motor Co. v. Huffman, 345 U.S. 330 (1953). A discussion of the extent of the duty of fair representation and whether it

ization or not. The primary reason for a representative's certification is to gain benefits for the employees. If he carries out his charge effectively, benefits should accrue to all the workers in the unit. If the representative does not do his job, he can be decertified.[90]

Compulsory union membership in the national labor scheme of regulation is justified for the most part by the principle of exclusivity and the duty imposed on the exclusive bargaining agent to represent all the employees in the bargaining unit, whether they are members of the labor organization or not. The "free rider" argument appeals to the canons of fairness. A majority of workers through the democratic process have selected a bargaining agent. This agent incurs expenses in carrying out his statutory obligations which may include the salary of the employees' negotiator, the costs of negotiating and administering the agreement and the cost of operating the grievance and arbitration machinery. The representative has a duty to represent all the employees, and the respresentative's efforts, if successful, obtain benefits for the entire group. Every employee, for example, has a right to file a grievance if a grievance procedure is established.[91] It is only logical that employees benefiting as a result of the bargaining agent's work should pay a pro rata share of the costs. To allow some employees to escape their financial obligations (be "free riders") by making membership voluntary necessarily increases the financial burden of other employees. Allowing "free riders" would be basically unfair.

C. COMPULSORY UNION MEMBERSHIP

The pith of the right-to-work controversy can be found in the proviso to Section 8(a)(3)[92] which Congress enacted as a partial response

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reaches far enough to protect individual rights can be found in Clark, *The Duty of Fair Representation: A Theoretical Structure*, 51 TEX. L. REV. 1119 (1973).

90. Decertification is authorized by NLRA § 9, 29 U.S.C. § 159 (1970).

91. In Hughes Tool Co., 104 NLRB 318 (1953) a union required nonmembers to pay a fee for handling grievances to arbitration. The NLRB did not allow the fee. The Board could have revoked the union's certification since it was the union's duty to represent all the employees without discrimination. In Port Drum Co., 170 NLRB 555 (1968), the Board held that a union committed an unfair labor practice when it refused to arbitrate the case of a discharged employee who was not a member.

92. NLRA § 8(a)(3), 29 U.S.C. § 158(a)(3) (1970), reads:

> It shall be an unfair labor practice for an employer by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: *Provided*, That nothing in this Act, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later, (i) if such labor organization is the representative of the employees as provided in section 159(a) of this title, in the appropriate collective-bargaining unit covered by such agreement when made; and (ii) unless following an election held as provided in section 159(e) of this title within one year preceding the effective date of such agreement, the Board shall have certified that at least a majority of the employees eligible to vote in such election have voted to rescind the authority of such labor organization to make such an agreement: *Pro-*

to the "free rider" argument. Sections 8(a)(3) and 8(b)(2)[93] prohibit discrimination in hiring, firing and conditions of employment which influence membership in a labor organization.[94] An exception to this rule allows an employer and labor organization, which has been designated an exclusive bargaining representative to make an agreement requiring bargaining representative, to make an agreement requiring membership in the organization as a condition of employment within thirty days after being hired. The language precludes an employer or union from discriminating against an employee for not being a member of the labor organization when he applies for employment; thus, a closed shop[95] agreement requiring membership before being hired is unlawful. A classic union shop arrangement, however, compelling a worker to join the labor organization and maintain his membership once he has been working at least thirty days is permitted.[96] But the exception is qualified by the further proviso limiting enforcement of the first. This proviso reads:

> [N]o employer shall justify any discrimination against an employee for nonmembership in a labor organization (A) if he has reasonable grounds for believing that such membership was not available to the employee on the same terms and conditions generally applicable to other members, or (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership.[97]

In 1951 the Seventh Circuit Court of Appeals enforced an order of the National Labor Relations Board in the case of *Union Starch & Refining Co. v. NLRB*,[98] based on its construction of this proviso. The complainants were former employees of the company who had been discarged upon union request because they had failed to make an ap-

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vied further, That no employer shall justify any discrimination against an employee for nonmembership in a labor organization (A) if he has reasonable grounds for believing that such membership was not available to the employee on the same terms and conditions generally applicable to other members, or (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquirng or retaining membership. . . .

93. NLRA § 8(b)(2), 29 U.S.C. § 158(b)(2) (1970), provides:
It shall be an unfair labor practice for a labor organization or its agent to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a)(3) or to discriminate against an employee with respect to whom membership in such organization has been denied or terminated on some ground other than his failure to tender the periodic dues and the initiation fee uniformly required as a condition of acquiring or retaining membership.

94. Radio Officers' Union v. NLRB, 347 U.S. 17 (1953); Phelps Dodge Corp. v. NLRB, 313 U.S. 177 (1941).

95. Refer to note 61 *supra* for definition.

96. Refer to note 32 *supra* for definition.

97. NLRA § 8(a)(3), 29 U.S.C. § 158(a)(3) (1970).

98. 186 F.2d 1008 (7th Cir. 1951), *cert. denied*, 342 U.S. 815 (1951).

plication for membership, attend a union meeting and take the union oath of loyalty. These employees had offered to pay the dues and initiation fees. The Board held that the employer and union had committed an unfair labor practice. The court and Board agreed that on the basis of the statute, a union may impose any reasonable conditions or qualifications for membership and keep employees out of the union if they do not comply; but the sole basis for discharge or causing a discharge from the job is the failure of an employee to tender periodic dues or initiation fees. The last proviso protects the employee from discharge for any other reason.[99] Two years later the Supreme Court, in discussing the element of "membership" in its decision in *Radio Officers v. NLRB*,[100] cited the *Union Starch* decision saying:

> [C]ongress intended to prevent utilization of union security agreements for any purpose other than to compel payment of union dues and fees. Thus Congress recognized the validity of unions' concern about the "free riders," *i. e.*, employees who receive the benefits of union representation but are unwilling to contribute their share of financial support to such union, and gave unions the power to contract to meet that problem while withholding from unions the power to cause the discharge of employees for any other reason. . . .[101]

Since these decisions, the cases are legion on this aspect of Section 8(a) (3),[102] settling the issue in respect to denying or terminating membership[103] and further defining the meaning of periodic

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99. *Id.* at 1011-12.

100. 347 U.S. 17 (1953).

101. *Id.* at 41.

102. NLRB v. General Motors Corp., 373 U.S. 734 (1963). Refer to notes 104-106 *infra.*

103. NLRB Chairman Miller in his dissent to the decision of the NLRB in Hershey Foods Corp., 207 NLRB 141 (1974), read the provisos very narrowly. The employee had voluntarily resigned from the union and the union demanded his discharge. Chairman Miller maintained that on the facts (1) the union security agreement requiring membership was unlawful; (2) membership was available upon the same terms as was generally applicable to others; and (3) membership was not terminated or denied, therefore, the proviso protecting the employees from dishcarge for any other reason than the failure to pay periodic dues and initiation fees was not applicable. The majority rejected this argument on the basis of NLRB v. General Motors Corp., 373 U.S. 734 (1963) and Union Starch Refining Co. v. NLRB, 186 F.2d 1008 (7th Cir. 1951).

The importance of this dissent is that the interpretation is logical and is not precluded by language of the *General Motors* opinion. If it would eventually prevail, it could effectively prevent a union member from resigning. This would make NLRA § 8(a)(3), 29 U.S.C. § 158(a)(3) (1970), supportive of the maintenance-of-membership form of union security, that is, once a worker has joined the union he shall remain a member for the duration of the agreement. Maintenance-of-membership would add another distinguishing characteristic to the difference between the union shop under § 8(a)(3) and the agency shop. Refer to notes 30 & 32 *supra.*

The weakness in Chairman Miller's dissent is in the judicial opinion to the contrary. Refusing to join (the factual situation in *Union Starch*) does not violate any of the precepts set down by Miller, yet the court did not condone the discharge. The question remains, nonetheless, whether there is an effective difference between refusing to join and voluntarily resigning. One distinction of little relevance is that the facts behind refusal to join are generally more compelling than the reasons for resigning.

Another important issue raised by the dissent is the impact of Miller's view on union discipline. Refer to text accompanying notes 110-12 *infra.* The practical but intolerable result could be that workers would be wise not to join the union. This would permit control by a few, once a majority have by secret ballot voted to organize.

dues and initiation fees. An employee may not be discharged from his employment for failing to pay special assessments[104] or fines,[105] or failing to be a member in good standing.[106] Tardiness in payment of dues and initiation fees may not be a basis for discharge so long as they are paid before certification for discharge actually takes place.[107]

D. UNION SHOP V. AGENCY SHOP

What *real* distinction still exists between the 8(a) (3) union shop and the traditional agency shop arrangement is debatable.[108] There are two differences, nonetheless, which may be of continuing importance. The 8(a) (3) union shop security clause requires payment of periodic dues and initiation fees, whereas the agency shop agreement demands payment of a service fee. The terms dues and service fees may sometimes mean the same thing, but cannot be used interchangeably. The service fee may be limited to a payment by the nonmembers of an amount not exceeding the actual cost of representation and benefits provided by the union shared on a pro rata basis. This amount may not equal dues and initiation fees.[109]

The single difference cited by the Supreme Court in *NLRB v. General Motors Corp.*[110] was that under a union shop provision an employee may be enrolled as a member by the union, if it so chooses, after he has paid his dues and initiation fees. The choice is clearly the union's to make. Conversely, under the agency shop the choice is made by the employee as to whether he will become a member or not. This difference becomes more significant when related to another aspect of compulsory union membership raised in *NLRB v. Textile Workers*[111] and *Booster Lodge No. 405 v. NLRB.*[112] The complainants had been union members who had participated in a strike-vote. During

104. NLRB v. Food Fair Stores, Inc., 307 F.2d 3 (3d Cir. 1962); Journeyman Plasterers' v. NLRB, 341 F.2d 539 (7th Cir. 1965); NLRB v. Die & Tool Makers Lodge No. 113, 231 F.2d 298 (7th Cir. 1956).

105. NLRB v. Eclipse Lumber Co., 199 F.2d 684 (9th Cir. 1952); NLRB v. Leece-Neville Co., 330 F.2d 242 (6th Cir. 1964); NLRB v. Longshoremen's Local 17, 431 F.2d 872 (9th Cir. 1970); Associated Home Builders v. NLRB, 145 NLRB 1775, *enforced* 352 F.2d 745 (9th Cir. 1965) (Union could not transfer dues payments to satisfy fines, thus requiring members to pay dues again or face discharge).

106. NLRA § 8(a)(3), 29 U.S.C. § 158(a)(3) (1970), insulates employee's jobs from organizational rights; employees may be good, bad or indifferent members of the union. Radio Officers v. NLRB, 347 U.S. 17, 40 (1953); NLRB v. Local 50, American Bakery & Confection Wkrs. U., 339 F.2d 324 (2d Cir. 1964); NLRB v. Bell Aircraft Corp., 206 F.2d 235, (2d Cir. 1953).

107. Brady v. Trans World Airlines, Inc., 401 F.2d 87 (3d Cir. 1968), *cert. denied* 393 U.S. 1048 (1969); International Union of Electrical R. & M. Wkrs. v. NLRB, 307 F.2d 679 (D.C. Cir. 1962), *cert. denied* 371 U.S. 936 (1962). Union by its actions waived delinquent dues; discharge was an unfair labor practice. NLRB v. Brotherhood of Teamsters, 458 F.2d 222 (9th Cir. 1972).

108. Refer to definition of agency shop and union shop at notes 30 & 32 *supra.*

109. OP., *supra* note 11, at 142.

110. 373 U.S. 734, 743-44 (1963).

111. NLRB v. Textile Workers, 409 U.S. 213 (1972).

112. Booster Lodge No. 405 v. NLRB, 412 U.S. 84 (1973).

the strike they resigned from the union and returned to work for which the union disciplined them by imposing fines. The Court held that since there was no impediment to their resignations in the union constitutions and bylaws, the workers could resign, and since they were no longer members, the union could not discipline them. These sets of facts and decisions will inevitably raise the question of how stringent a union constitution and bylaws may be in restricting resignation of members. The result could give advantage to the union having a union shop agreement if the union could keep all the employees on its rolls and restrict resignations in its constitutions and bylaws on a reasonable basis, thereby subjecting all the employees in the unit to union discipline. The union could not have the erring member discharged, but it could fine him and have the fine enforced on a contract theory in the state courts.[113]

E. THE REAL ISSUE AT THE FEDERAL LEVEL

Membership, therefore, in the dictionary-sense of the word, is not required under the Act. At the very most a worker can be compelled, thirty days after being hired, to tender payment of dues and initiation fees, but only if (1) an exclusive bargaining representative has been properly selected by a majority of the employees at the place of work, and (2) the employer and representative (as agent for these very same employees) have agreed to write a union security clause requiring such payments into the collective bargaining contract. The duty to pay dues and initiation fees arises from this private agreement.

This section represents a compromise to accommodate the freedom of association arguments of the right-to-work protagonists and the "free rider" (fair play) arguments of the union. It could well be asserted: there is no violation of the freedom of association—membership is not required, so, neither is association; the statute and case law have eliminated "compulsory union membership" and thereby the need for right-to-work laws.[114]

Being compelled to pay dues to an orgainzation or group is not

113. NLRB v. Boeing Co., 412 U.S. 92 (1973); NLRB v. Allis-Chalmers Mfg. Co., 388 U.S. 175, 177-82 (1967) (Court enforcement of fines is a necessary consequence of the contract theory of the union-member relationship).

114. Right-to-work advocates can still argue about the obligation to pay dues—a fee for services rendered but not requested. An analogy to the government and its taxing power can be drawn; one cannot refuse to pay taxes when one renounces his citizenship so long as he continues to live within the boundaries of this country—the non-citizen receives the benefits of roads and schools whether he requests them or not. To be sure labor unions and management are power groups in the private sector and do not have the sovereignty or the support of constitutional government of the people behind them. The United States, however, through the labor acts, has delegated authority. *See* Steel v. Louisville & Nashville R.R., 323 U.S. 192, 198-99 (1944). Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574 (1960), allowed the labor organization and the employer, through the process of collective bargaining and agreement, to set up a form of industrial self-government. *Id.* at 579-80.

like being forced to become a group member, adhering to group discipline and being associated with the group's stands on the issues of the day. The dues-paying requirements do not violate any constitutional precepts so long as the dues are for services rendered; it is fair for the recipient of benefits to share in the cost of obtaining them.[115]

The challenges to payment of compulsory dues and initiation fees have been based primarily on objections to use of these moneys for political purposes and on religious grounds. The crux of the objection is giving financial support to causes to which the payor may not necessarily subscribe or paying compulsory tolls to private organizations[116] with which the payor may be in ideological or conscientious disagreement. There is no valid legal basis for attacking the statute which authorizes these exactions so long as the financial resources so collected are spent for negotiating expenses, administration of the agreement or the costs of carrying out the grievance and arbitration procedures.[117] A challenge would most likely not be sustained if expenditures are closely related to the duties of the exclusive bargaining representative and the benefits received by all the employees.[118] It is the use of the dues and initiation fees for purposes beyond these basic expenses, especially for political activity, which is disputed.

The leading cases challenging the compulsory exaction of dues to support political activity have arisen from Section 2, Eleventh, of the Railway Labor Act.[119] This section is similar to Section 8(a) (3). In *International Association of Machinists v. Street*[120] the employees objected to the union's action in spending a portion of their compulsory dues and initiation fees for political purposes. The compulsory nature of the exaction was upheld as constitutional, but the Court interpreted the section to restrict labor organizations in the ways they may expend the funds collected in this compulsory manner. The words of the Court per Justice Brennan were: the unions are denied, "over an employee's objection, the power to use his exacted funds to support

115. In Railway Employee's Dept. v. Hanson, 351 U.S. 225 (1956) the Supreme Court rejected the contention that compulsory payment of dues infringed the right of association. *See also* Lathrop v. Donohue, 367 U.S. 820 (1961) wherein seven members of the Court found no constitutional infirmity in being required to pay dues to the state bar association in order to practice law.

116. The labor organization has traditionally been considered a voluntary private organization. Oliphant v. Locomotive Firement & Enginemen, 262 F.2d 359 (6th Cir. 1959). *See also* Steele v. Louisville & Nashville R.R., 323 U.S. 192 (1944). Its voluntary private stature, however, should not be confused with its role as an exclusive bargaining representative for a group of employees, the primary purpose for which labor unions are formed. The exclusive bargaining role is an agency relationship created by the federal government, and rights in this role are enforced by a governmental agency, the NLRB and the federal courts. When acting as an exclusive bargaining agent, therefore, the labor organization must lose a degree of its voluntary private characteristic.

117. Railway Employees' Dept. v. Hanson, 351 U.S. 225 (1956).

118. *Id.*

119. 45 U.S.C. § 152, Eleventh (1970).

120. 367 U.S. 740 (1961).

political causes which he opposes."[121] The objection of the employee is a necessary element. The Court expressed no opinion on any other union expenditures which an employee might oppose.[122] The case of the *Brotherhood of Railway Clerks v. Allen*[123] provided a remedy of a proportionate refund and a reduced exaction in the payment of future dues.

One of the practical difficulties with the *Street* decision is pointed out in the dissent.[124] If it can be assumed that the exclusive bargaining representative has a right to have the fair cost of his operation paid for equally by those who benefit from it, the point in issue becomes one of degree of relatedness or directness of the benefit. Where is the line to be drawn between the activity which is acceptable for expenditure of funds and that which is not? Although no one wants to force an employee to contribute support to political, religious or social movements with which he does not agree, it cannot be gainsaid that politically-active labor unions may achieve as much benefit for the employees they represent by lobbying for pro-labor legislation and electing pro-labor candidates as they do at the negotiating table.

The second question raised by the decision is of a technical nature. Could the Court, as an alternative to its interpretation of Section 2, Eleventh of the Railway Act, have avoided the constitutional issue by finding there was no "state action" involved? Section 2, Eleventh like Section 8(a)(3) is only permissive. The obligation to pay dues and initiation fees arises from a private contract negotiated by an employer and labor organization, essentially private parties. This theory rises to a higher level of importance when applying the rationale of the *Street* case to causes of action on a similar set of facts based on Section 8(a)(3). Although the wording of Section 8(a)(3) and Section 2, Eleventh are similar, the state action requisite for application of constitutional protection may be weakened by the unique characteristics of the NLRA, especially the exception created by Section 14(b).[125]

Taking into account the whole of the national labor scheme, it would seem reasonable to apply the *Street* decision to unions under the jurisdiction of the NLRA.[126] A dividing line between appropriate and

121. *Id.* at 768-69.
122. *Id.* at 769.
123. 373 U.S. 113, 122 (1963).
124. Machinists v. Street, 367 U.S. 740, 797-819 (1961) (Frankfurter, J., dissenting).
125. "In NLRA matters, the federal government does not appear to have so far insinuated itself into the decision of a union and employer to agree to a union security clause so as to make that choice governmental action for purposes of the first and fifth amendments." Reid v. McDonnell Douglas Corp., 443 F.2d 408, 410-11 (10th Cir. 1971), *second appeal* at 479 F.2d 517 (10th Cir. 1973). *See also*, Buckley v. American Fed. of Television & Radio Artists, 496 F.2d 305 (2d Cir. 1974); H. WELLINGTON, LABOR AND THE LEGAL PROCESS 252-64 (1968).
126. Seay v. McDonnell Douglas Corp., 427 F.2d 996 (9th Cir. 1970); Linscott v. Miller Falls Co., 440 F.2d 14 (1st Cir. 1971).

inappropriate expenditure would be discernible only after sufficient objections had been raised and decisions rendered according to the circumstances of the individual case. This would allow some protection for the individual, contingent upon his objection, and yet would permit the union to carry out its objectives within the law.

Another answer to objectionable political contributions by labor unions is provided by statutes which make it unlawful for labor organizations to contribute or expend moneys for the election of candidates to federal office.[127] The essential element in determining a violation of these statues is the voluntariness of the contribution to the fund used for political purposes.[128] When unions establish separate political funds, resources for the fund may not come from compulsory dues and initiation fees.[129] Donations to these union funds should be voluntary. Enforcement of these statutes would prevent use of dues and initiation fees to support federal political candidates which individual members or non-members may be against. It would set a dividing line for the use of compulsory dues between support of political candidates (illegal) and lobbying efforts for legislation beneficial to labor, members and non-members alike (legal)—a suitable compromise.

Religious objectors have not fared so well as those who protested the channeling of their funds toward political purposes. The hardest case on the facts was brought in 1956 shortly after the Railway Labor Act had been amended to allow a union shop notwithstanding any statute or law.[130] The plaintiffs had worked for the railroad since 1914 and 1917; they had for these years of service earned valuable benefits. As members of a sect called the Plymouth Brethern they objected to being "unequally yoked together with unbelievers"[131] and paying money into a common treasury to support unbelievers. They did volunteer to pay an amount equal to dues and initiation fees to a charity. The unions asked the employing railroads to dismiss these employees because they had failed to pay the dues and initiation fees required by the terms of the collective bargaining agreement. The plaintiff religious objectors lost. Since this case arose under the Railway Labor Act a state right-to-work law would not have helped them.[132]

Recently Seventh-Day Adventists have been the predominate group challenging the requirement of paying dues and initiation fees

127. 18 U.S.C. § 610 (1970), *as amended*, 18 U.S.C. § 610 (Supp. II, 1972).
128. Pipefitters Local 562 v. United States, 407 U.S. 385 (1972).
129. *Id.* at 415, 430.
130. Wicks v. Southern Pac. R.R., 231 F.2d 130 (1956), *cert. denied*, 351 U.S. 946 (1956).
131. II Corinthians 6, v. 14: "Be ye not unequally yoked together with unbelievers: for what fellowship hath righteousness with unrighteousness? and what communion hath Light with darkness?"
132. Hudson v. Atlantic C. R.R., 242 N.C. 650, 89 S.E.2d 441 (1955).

to labor organizations. Although the doctrine of the church does not demand resistance to membership or these tolls, the basic belief is opposed to "striving."[133] The gravamen of the cause is a matter of individual conscience which will not allow the Seventh-Day Adventists to participate or support any concept of striving. Thus, paying moneys into a common treasury, a part of which is used to support strikes and picketing may be contrary to religious beliefs determined on an individual basis.[134] Does payment of dues and initiation fees inhibit the free exercise of their religion? The federal courts of appeals have uniformly turned back the challenge.[135] Most recently the compulsory payment of dues and initiation fees has been challenged by the Adventists as a religious discrimination under the Civil Rights Act of 1964.[136] The challenge did achieve a reversal in the court of appeals but it was not a clear-cut victory. The court reversed, noting that an attempt to make a reasonable accommodation is required if it can be accomplished without undue hardship.[137] The opinion did reflect a certain pessimism about the chances for accommodation but stated it was a matter for the district court to determine.[138]

The opinions of the various courts of appeals confronted with bona fide religious objectors have not been convincing, especially if the reasoning reached the point of balancing interests.[139] It is difficult to conceive of compulsory payment of dues and initiation fees, considering the legislative exception allowed by Section 14(b), as a compelling state interest.[140] A narrow exception would not bring the labor movement to its knees nor thwart the goal of industrial peace. There is a factual parallel to the Amish insistance on educating their own children and the Wisconsin statute compelling attendance at the state's accredited schools. The statute would seem to represent a much more compelling state interest.[141] Beyond the legal niceties the courts and labor unions appear to be taking a position of undue rigidity.

IV. CONCLUSION

The individual and his rights are of primary importance in estimating the continuing worthwhileness of right-to-work laws. As right-to-work proponents contend, a citizen-worker should be free

133. Gray v. Gulf, M. & O. R.R., 429 F.2d 1064, 1066 n.4 (5th Cir. 1970).
134. *Id.*
135. Hammond v. United Papermakers, 462 F.2d 174 (6th Cir. 1972); Linscott v. Miller Falls Co., 440 F.2d 14 (1st Cir. 1971); Gray v. Gulf, M. & O. R.R., 429 F.2d 1064 (5th Cir. 1970); Otten v. B. & O. R.R., 205 F.2d 58 (2nd Cir. 1953).
136. Yott v. North American Rockwell Corp., 501 F.2d 398 (9th Cir. 1974).
137. *Id.* at 403.
138. *Id.*
139. Linscott v. Miller Falls Co., 440 F.2d 14 (1st Cir. 1971).
140. *Id.* at 17.
141. Wisconsin v. Yoder, 406 U.S. 205 (1972).

to associate or not associate as it fits his purpose. He should be free to pursue his livelihood. These considerations, however, do not settle the right-to-work issue, neither rights nor freedoms have ever been accorded such "absoluteness."

Notwithstanding that there may be a right to work, a right-to-work law does not insure it. Right-to-work concerns itself only with a single facet of the right or freedom to associate or freedom of choice. This concern, by construction of the federal statutes, has been pared to a contention that an individual worker should not be required to pay dues and initiation fees to a labor organization in order to keep his job. The purpose for requiring payment of these dues and initiation fees becomes the crucial factor.

That the individual can acquire a benefit from right-to-work legislation there can be no doubt. This benefit to the individual comes at the detriment of his fellow workers. The discrimination effected by a right-to-work law is that it penalizes those workers who have elected to organize, as it is their right to do under federal legislation. Those employees who have selected the exclusive bargaining agent must pay their own allocation of the collective bargaining costs plus a percentage for those who choose not to pay their share. Electing to organize thus becomes more expensive to the individual worker and automatically increases the number who may vote against it; this hampers organizational efforts and is contrary to the spirit of national labor policy—workers should be free to organize.

The goal of national labor policy is to promote industrial peace and stability. To this end an apparatus for negotiation between employer and employees has been set up. An open shop enforced by a right-to-work law does not lend itself to achieving the goal. Under the open shop the extreme social pressures to join are not eliminated. A majority of the workers have authorized the exclusive bargaining agent to act on their behalf; they are willing to pay the agent for his services because they believe he will negotiate increased benefits for them. The friction within the unit between those paying the bills and those not doing so—where the benefits are being received by all—can be intense. Where voluntarism as to payment of dues and initiation fees is eliminated, the worker is not required to join but does pay his fair share of the expenses; as a consequence his fellow workers do not care whether he is a member or not.

Section 8(a)(3)[142] requires a worker to tender dues and initiation fees as a condition of employment. The tender is demanded only if an employer and an exclusive bargaining agent have agreed to it. The section offers a compromise to the basic conflict between the right to freely associate and the worker's demand for fair play, that

142. NLRA § 8(a)(3), 29 U.S.C. § 158(a)(3) (1970).

is, all workers paying a pro rata share for benefits received. This section des not require actual membership in the labor organization, yet eliminates the "free rider." Section 14(b)[143] nullifies this compromise when it allows states to enact laws prohibiting it.

The right-to-work laws should not be allowed to upset the balance of power at the collective bargaining table. If the laws are enacted to give an advantage to management or to weaken labor, the object is not permissible and Section 14(b) is providing a means for abuse of the national labor policy. There could be no valid reason for Congress allowing the states to determine the relative strength of the parties to the collective bargaining process after having concocted the elaborate scheme encompassed in the National Labor Relations Act to achieve the same purpose.

Section 14(b) permits an erratic application of the national labor policy among the states. The net result of 14(b) is a crazy pattern which has thirty-one states subscribing to the provisos of Section 8(a)(3) and nineteen states with right-to-work laws which apply to everyone in those states except railroad and airline workers. Because Section 2, Eleventh of the Railway Labor Act is controlling in all fifty states notwithstanding any right-to-work law, there is a major inconsistency without apparent justification between the labor policy under the NLRA and RLA.

As an adjunct to the federal scheme of labor regulation, the right-to-work law adds very little of value to the panoply of protections accorded the individual worker. The right-to-work issue has achieved a certain credibility at the state level so that it can effectively be used to corrupt other meaningful proceedings, yet be of little legal significance.

The best solution to the conflict between freedom to associate and "free rider" has been the one devised over the years by the North Dakota Attorneys General,[144] now set aside by the North Dakota Supreme Court.[145] The opinions of the attorney general put into practice the theoretical prospect envisioned by the United States Supreme Court in the *Hanson*[146] and *Street*[147] decisions: expenditure of compulsory exactions should be closely related to the process of collective bargaining. Payment of a service fee for benefits received cannot seriously be considered repugnant to any constitutional principle; it should not make any difference if the individual receiving the benefits necessarily endorsed the legal means for achieving them.

The right-to-work movement has made contributions to the devel-

143. NLRA § 14(b), 29 U.S.C. § 164(b) (1970).
144. OP., *supra* note 11, at 142.
145. Ficek v. International Bhd. of Boilermakers, 219 N.W.2d 860 (N.D. 1974).
146. Railway Employees' Dept. v. Hanson, 351 U.S. 225 (1956).
147. Machinists v. Street, 367 U.S. 740 (1961).

opment of American labor law, but its period of usefulness has been spent. Section 14(b) which gave the movement life at the state level has also served its purpose. In the stead of Section 14(b) statutory or judicially-created assurances should be provided: (1) that bona fide religious objectors or conscientious objectors will be granted an exception to union security provisions or at a minimum some accommodation, and (2) that compulsory tolls collected within the federally-provided framework be expended for purposes "closely related" to the process of collective bargaining.